

## 980 CMR 17.00: ENERGY FACILITIES SITING BOARD

### 980 CMR 17.00: CONSTRUCTIVE APPROVAL

#### Section

- 17.01: Purpose and Scope.
- 17.02: Constructive Approval Procedure.
- 17.03: Contents and Form of a Constructive Approval.
- 17.04: Issuance of a Constructive Approval.
- 17.05: Effect of Decision and Right to Appeal.

#### 17.01: Purpose and Scope.

(1) Purpose. 980 CMR 17.00 establishes the requirements pertaining to a Constructive Approval, which the Board shall issue if a Final Decision, pursuant to 980 CMR 13.10: *EFSB Consolidated Permit Decisions*, is not issued by the Board, pursuant to 980 CMR 13.02(4)(a): *Review Timeframe*.

(2) Scope. 980 CMR 17.00 applies to each Application submitted to the Board for a CEIF. M.G.L. c. 164, §§ 69T, 69U, 69V. 980 CMR 17.00 shall not apply to De Novo Adjudications pursuant to 980 CMR 14.00.

(3) Applicability of Earlier Sections. 980 CMR 1.00, 2.00, 13.00, 15.00, and 16.00 apply to 980 CMR 17.00, unless otherwise noted.

(4) Definitions. The definitions in 980 CMR 1.00 and 13.00 shall apply to 980 CMR 17.00. For the purpose of 980 CMR 17.00, the following additional definition applies unless the context or subject matter requires a different interpretation:

Constructive Approval means a Consolidated Permit or Consolidated State Permit that is constructively (automatically) approved and issued by operation of law under M.G.L. c. 164, §§ 69T, 69U, or 69V, and 980 CMR 17.05. A Constructive Approval may include zoning exemptions, provided that the Applicant at the time of the Completeness Determination includes a zoning exemption request, and the Applicant includes a Zoning Statement pursuant to 980 CMR 17.03(1)(b)4. The contents and form of Constructive Approvals are defined in 980 CMR 17.03.

#### 17.02: Constructive Approval Procedure.

(1) Procedural Assessment. At least sixty days before the applicable deadline established by 980 CMR 13.02(4)(a): *Review Timeframe*, the Presiding Officer shall assess the progress of the proceeding to determine whether there is reasonable assurance that the Board will issue a Consolidated Permit or Consolidated State Permit by the applicable deadline. The Presiding Officer may conduct a status conference to inform their assessment of progress of the proceeding.

(2) Notice of Likelihood of Constructive Approval. If the Presiding Officer does not find reasonable assurance that the Board will meet its deadline to issue a Final Decision, the Presiding Officer shall, at least sixty days before the applicable deadline, prepare and

## 980 CMR 17.00: ENERGY FACILITIES SITING BOARD

issue to the Parties, Limited Participants, Permit Enforcement Agencies, and the Board a Notice of Likelihood of Constructive Approval that references 980 CMR 17.02, states that a Constructive Approval is likely, and describes the reasons for that assessment.

(3) Issuance of Draft Constructive Approval. Within two weeks after the issuance of the Notice of Likelihood of Constructive Approval, the Applicant shall prepare and circulate the draft Constructive Approval to the service list prepared by the Presiding Officer for the proceeding pursuant to 980 CMR 1.03(3): *Service to Board, Parties, and Participants*, and any additional Permit Enforcement Agencies (PEAs) not included on the service list.

(a) Form of Draft Constructive Approval. The draft Constructive Approval shall comply with the requirements of 980 CMR 17.03, except that the document will be titled “draft Constructive Approval” and will be marked “DRAFT” on all pages.

(b) Draft Constructive Approval. The draft Constructive Approval prepared by the Applicant shall consist of: (i) the Application at the time of the Completeness Determination, and updates to the Project filed pursuant to 980 CMR 13.07(1)(c): *Updated Filing*, and (ii) the Recommended Permit Conditions and Requirements issued by the Presiding Officer pursuant to 980 CMR 13.07(6): *Conditions Conference*, that are consistent with: (i) the record evidence in the proceeding; (ii) the Board’s statutory authority, and (iii) the Board’s applicable rules, regulations, and other authority as provided in 980 CMR 2.02(3): *Scope of Review*. The Applicant may include a modification of a condition included in the Recommended Permit Conditions and Requirements issued by the Presiding Officer pursuant to 980 CMR 13.07(6): *Conditions Conference*, in the draft Constructive Approval, provided the modification is consistent with: (i) the record evidence in the proceeding; (ii) the Board’s statutory authority, and (iii) the Board’s applicable rules, regulations, and other authority as provided in 980 CMR 2.02(3): *Scope of Review*.

(4) Comment Period and Opportunity for Revision.

(a) The Presiding Officer shall designate a comment period, extending at least seven days and not more than 14 days, from the issuance of the draft Constructive Approval. During that time, the recipients of the draft Constructive Approval may file written comments regarding the draft to ensure compliance with 980 CMR 17.03.

(b) Within seven days after the conclusion of the comment period, the Applicant shall update the draft Constructive Approval to include revisions that are consistent with: (i) the record evidence in the proceeding; (ii) the Board’s statutory authority, and (iii) the Board’s applicable rules, regulations, and other authority as provided in 980 CMR 2.02(3): *Scope of Review*, and circulate it to the service list.

(c) Within seven days thereafter, the Presiding Officer may modify the updated draft Constructive Approval prepared by the Applicant if and to the extent that the draft Constructive Approval, as modified by the Applicant following the comment period held pursuant to 980 CMR 17.02(4)(a), is

## 980 CMR 17.00: ENERGY FACILITIES SITING BOARD

inconsistent with: (i) the record evidence in the proceeding; (ii) the Board's statutory authority, or (iii) the Board's applicable rules, regulations, and other authority as provided in 980 CMR 2.02(3): *Scope of Review*. The Presiding Officer shall explain any modifications and ensure compliance with 980 CMR 17.03.

(d) The draft Constructive Approval as updated by the Presiding Officer pursuant to 980 CMR 17.02(4) shall be issued as a final Constructive Approval consistent with 980 CMR 17.04.

(5) If the Presiding Officer issues the Notice of Likelihood of Constructive Approval prior to the Conditions Conference and the issuance of the Presiding Officer Recommended Permit Conditions and Requirements, then the Presiding Officer may schedule a Conditions Conference earlier than specified in 980 CMR 13.07(6): *Conditions Conference*. The Presiding Officer shall issue Recommended Permit Conditions and Requirements. The parties shall have an opportunity to comment on the Recommended Permit Conditions and Requirements consistent with 980 CMR 13.07(3): *Adjudicatory Proceeding*. The process for the draft Constructive Approval shall be consistent with 980 CMR 17.02(3) and the Comment Period and Opportunity for Revision shall be consistent with 980 CMR 17.02(4).

(6) If the Presiding Officer fails to act regarding any provision of 980 CMR 17.00 in the timeframe provided, the Presiding Officer will have an additional seven days in which to perform the missed procedural step. If the Presiding Officer does not complete the missed procedural step by the end of the additional seven days, the next procedural step required in 980 CMR 17.00 shall commence regardless. In no event shall such action exceed the procedural timeframe for Constructive Approval set forth in 980 CMR 13.02(4)(a): *Review Timeframe*.

(7) Continuing Right to Issue a Decision on a Consolidated Permit or Consolidated State Permit. The Presiding Officer Notice of Likelihood of Constructive Approval shall not prohibit the Board from issuing a Final Decision pursuant to 980 CMR 13.10: *EFSB Consolidated Permit Decisions*, on an EFSB Consolidated Permit prior to the applicable statutory review timeframe pursuant to 980 CMR 13.02(4)(a): *Review Timeframe*.

### 17.03: Contents and Form of Constructive Approval.

(1) Contents. A Constructive Approval shall be in writing and shall include the following contents:

(a) Identifying Information.

1. Name of the Applicant, docket number(s), and project name.
2. Name, address, telephone number, and email address of the Applicant representative(s). See 980 CMR 13.01(4): *Definitions* and 13.03(1)(a): *Application Summary Form*.
3. The Applicant's Description of the Project, Site, and Surrounding Area pursuant to 980 CMR 13.03(1)(b): *Description of the Project, Site, and Surrounding Area*, including any updates in the evidentiary record of the proceeding pursuant to 980 CMR 13.07(1)(c): *Updated Filing*.

980 CMR 17.00: ENERGY FACILITIES SITING BOARD

(b) Required Permits and Approvals.

1. List. A list of all state, regional, and local permits and approvals listed on the Application pursuant to 980 CMR 13.05: *EFSB Permit Application Requirements*.
2. Agency Permit Requirements. A list of the agency permit requirements based on the latest information provided by the Applicant.
3. Draft Documents. All draft permits and approvals provided by the Applicant pursuant to 980 CMR 13.05(1)(a), (b)(d): *EFSB Consolidated Permit Application Requirements: Required Permits*, as the Applicant may have updated during the proceeding pursuant to 980 CMR 13.07(1)(c): *Updated Filing*.
4. Zoning Statement. A statement of the zoning exemptions that the Applicant has included in its Application at the Completeness Determination.

(c) Common Conditions Applicable Common Conditions pursuant to 980 CMR 13.09(2): *Common Conditions*, as identified in “13.00: EFSB Consolidated Permit Application Guidance,” Attachment 1: Common Conditions and Requirements for EFSB Consolidated Permits, unless expressly superseded by the Presiding Officer Recommended Permit Conditions and Requirements included in the draft Constructive Approval pursuant to 980 CMR 17.02.

(d) Presiding Officer Recommended Permit Conditions and Requirements included in the draft Constructive Approval pursuant to 980 CMR 17.02.

(e) The Applicant shall file an Abbreviated Procedural History that substantially complies with the following text:

The Applicant(s), \_\_\_\_\_ [name(s)], filed its/their Application on \_\_\_\_\_ [date]. The EFSB docketed the Consolidated Permit proceeding as \_\_\_\_\_. On \_\_\_\_\_ [date], pursuant to 980 CMR 13.06: *Completeness Determination*, the Presiding Officer issued a Completeness Determination. The Completeness Determination confirmed that the Applicant substantially and materially complied with each Application filing requirement. The Board was required, pursuant to 980 CMR 13.02(4)(a): *Review Timeframe*, to issue a final decision on a Consolidated Permit or Consolidated State Permit by \_\_\_\_\_ [date].

The Board did not issue a Consolidated Permit or Consolidated State Permit by \_\_\_\_\_ [date]. Therefore, pursuant to M.G.L. c. 164, § 69T (for a large clean energy infrastructure facility), § 69U (for a small clean transmission and distribution infrastructure facility), or § 69V (for a small clean energy generation facility or small clean energy storage facility) a Constructive Approval of the Project has been issued. The Applicant has obtained Constructive Approval, issued by operation of law under M.G.L. 164, §§ 69T,

## 980 CMR 17.00: ENERGY FACILITIES SITING BOARD

69U, or 69V, and 980 CMR 17.04 for all required state, regional, and local permits and approvals listed on part b(1) of this Constructive Approval as if the accompanying draft permits had issued in final form. The Applicant is likewise granted all requested zoning exemptions as referenced in part b(3) of this Constructive Approval.

(2) Statement of Decision's Effect and Appeal Rights. The Constructive Approval shall contain the text of 980 CMR 17.05(1) and 17.05(2).

(3) Form. The Board may specify the form of the Constructive Approval and may make available a template for that purpose.

### 17.04: Issuance of a Constructive Approval.

(1) If the Board has not issued a Consolidated Permit or Consolidated State Permit pursuant to 980 CMR 13.10: *EFSB Consolidated Permit Decisions*, within the applicable statutory timeframe under 980 CMR 13.02(4)(a): *Review Timeframe*, the draft Constructive Approval, as developed and modified pursuant to 980 CMR 17.02, shall be deemed issued on the applicable deadline date as a final Constructive Approval.

(2) The Presiding Officer shall distribute the final Constructive Approval to all persons entitled to notice within five business days of the applicable review timeframe under 980 CMR 13.02(4)(a): *Review Timeframe*.

(3) The evidentiary record shall close upon the distribution of the final Constructive Approval.

### 17.05: Effect of Decision and Rights of Appeal.

(1) Effect of Decision. In accordance with M.G.L. c. 164, §§69T(i), 69U(c), 69V(c), a Constructive Approval acts as an approval of all relevant permits and approvals from all state, regional, and local agencies required to construct and operate the Project. *See* 980 CMR 17.03(1).

(a) No state, regional, or local agency may require any other approval, consent, permit, certificate or condition for the construction, operation, or maintenance of the Project.

(b) No state, regional, or local agency may impose or enforce any law, ordinance, by-law, rule or regulation nor take any action nor fail to take any action, other than reasonably enforcing the conditions and requirements of the Constructive Approval, that would delay or prevent construction, operation, or maintenance of the Project.

(2) Rights of Appeal. Under M.G.L. c. 164, §§ 69T, 69U, or 69V, a Constructive Approval is deemed a final decision, and is subject to appeal under M.G.L. c. 164, § 69P. The appeal deadline shall be calculated from the date the Presiding Officer distributes the Constructive Approval pursuant to 980 CMR 17.04(2).

## 980 CMR 17.00: ENERGY FACILITIES SITING BOARD

(3) Scope of Review. The scope of such judicial review is governed by M.G.L. c. 164, § 69P. The scope of the appeal shall be limited to whether the Constructive Approval: (i) is in conformity with the Constitution of the Commonwealth and the United States Constitution; (ii) was made in accordance with the procedures established in M.G.L. c. 164, §§ 69H to 69O, inclusive, and §§ 69T to 69W, inclusive, and the rules and regulations of the Board with respect to such provisions; (iii) was supported by substantial evidence of record in the board's proceedings; or (iv) was arbitrary, capricious or an abuse of the Board's discretion under M.G.L. c. 164, §§ 69H to 69O, inclusive, and said sections §§ 69T to 69W, inclusive.

### REGULATORY AUTHORITY

980 CMR 17.00: M.G.L. c. 164, §§69T(i), 69U(c), 69V(c).